

UNPUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WILLIAM R. CLAY,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C04-3012-MWB

**REPORT AND
RECOMMENDATION**

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	PROCEDURAL AND FACTUAL BACKGROUND	2
A.	Procedural Background	2
B.	Factual Background	4
1.	Introductory facts and Clay's daily activities	4
2.	Clay's medical history	10
3.	Vocational expert's testimony	16
4.	The ALJ's decision	20
III.	DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD	23
A.	Disability Determinations and the Burden of Proof	23
B.	The Substantial Evidence Standard	27
IV.	ANALYSIS	29
V.	CONCLUSION	30

I. INTRODUCTION

The plaintiff William R.. Clay (“Clay”) appeals a decision by an administrative law judge (“ALJ”) denying his applications for Title II disability insurance (“DI”) and Title XVI supplemental security income (“SSI”) benefits. Clay claims the ALJ erred in disregarding the opinion of a consulting physician who examined him, failing to recognize that his past relevant work was performed with special accommodations, and improperly assessing the credibility of his subjective complaints. (See Doc. Nos. 6 & 8)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

Clay filed a claim for DI benefits on November 13, 1996. (R. 62-65) Clay was found to be “significantly disabled secondary to a left below the knee amputation and its inability to heal.” (R. 42) He was awarded benefits beginning October 27, 1996. (See R. 37) Clay’s condition was scheduled for medical re-review in February 1999, and the Social Security Administration (“SSA”) scheduled two examinations for Clay. He missed both examinations, and after all attempts to contact him failed, the SSA found there was insufficient information in the file to determine whether his disability continued. His disability was determined to have ceased as of February 15, 1999, and his benefits were ceased as of April 15, 1999. (R. 38, 42-44)

On October 31, 2001, Clay protectively filed new applications for DI and SSI benefits, alleging a disability onset date of March 1, 2001. (R. 66-68; 499-501). Clay alleged he was disabled due to pain in his left leg as a result of the amputation, difficulty walking and lifting, and pain in his back and pelvic area. (See R. 118) His applications were denied initially on February 14, 2002. (R. 39, 45-48, 502-06). In its denial, the SSA noted Clay’s leg was amputated subsequent to a motorcycle accident in 1996. He

was fitted with a prosthesis, and worked for some period of time, ending in March 2001. The SSA found he “did not seek treatment for [his] condition again until October of 2001 when [he was] fitted for a new prosthesis.” (R. 46) The Agency found that although Clay was unable to work as of October 2001, he was expected to have a new prosthesis and his condition would have improved such that he could return to work by October 2002. Therefore, because his condition was not expected to remain severe enough to keep him from working for twelve continuous months or more, his application was denied. (*Id.*)

Clay filed a request for reconsideration in which he indicated his condition had worsened. (R. 49, 143-48) Specifically, he stated, “There is a sore on the bottom of my stump that does not allow me to use my prosthetic leg. It’s close to the bone and gets worse each time I wear my leg. I have lost my spleen and I’m sick most of the time.” (R. 143; see R. 41) His applications were denied upon reconsideration on August 1, 2002. (R. 40-41, 50-53, 507-12)

On September 3, 2002, Clay requested a hearing, stating, “I tried it your way. I couldn’t walk and hold a job and was sent home, fired because I [am] disabled, and I feel discriminated against by you.” (R. 54) A hearing was held before ALJ Robert Maxwell on May 21, 2003, in Spencer, Iowa. (R. 513-67) Clay was represented at the hearing by attorney Blake Parker. Clay testified at the hearing, as did Vocational Expert (“VE”) William V. Tucker.

On September 9, 2003, the ALJ ruled Clay was not entitled to benefits. (R. 10-29) Clay appealed the ALJ’s ruling, and on December 12, 2003, the Appeals Council denied Clay’s request for review (R. 5-7), making the ALJ’s decision the final decision of the Commissioner.

Clay filed a timely Complaint in this court on February 12, 2004, seeking judicial review of the ALJ's ruling. (Doc. No. 1) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Clay's claim. Clay filed a brief supporting his claim on May 3, 2004. (Doc. No. 6) The Commissioner filed a responsive brief on June 21, 2004 (Doc. No. 7), and Clay filed a reply brief on June 29, 2004 (Doc. No. 8).

The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Clay's claim for benefits.

B. Factual Background

1. Introductory facts and Clay's testimony

At the time of the hearing, Clay was fifty-one years old and not married. He was 5'9" tall and weighed 160 pounds. He stated he had gained ten or twelve pounds during the preceding two years because he had been living with his mother, and he was eating regularly and not going out much. (R. 517-18)

Clay stated he had lost his driver's license due to being an habitual OWI offender, and he believed he would become eligible to renew his license in three years. He had not applied for a work permit because he was not working, and he had not worked since March 2001. (R. 518)

Clay finished his junior year in high school, and later got a G.E.D. He explained that he had been a pretty good student, but he had to drop out of school because he went to prison, "related to drinking." (R. 518-19) After he lost his leg, he planned to take some machinist courses at a vocational-technical school. Vocational-Rehabilitation advised him to take some "pre-study courses" in English and math to see if he could

handle taking classes. He stated he never had algebra or physics in high school, and his English was “pretty hard.” He found it difficult to study and remember, and he did not complete the courses. (R. 519-20) He transferred to a different Voc-Rehab office, but ultimately, no retraining was recommended for him due to his difficulty with the learning process. (R. 520)

Clay stated his last job was with Bushman Conveyor Company. He worked on job sites in Nevada, Idaho, Pennsylvania, and Tennessee. He would inventory parts and tools that arrived at the job site, and then he supervised workers as they gathered the necessary parts and equipment and staged the job for the next day. According to Clay, he was fired because he missed too much work due to being sick. He stated he does not have a spleen and he gets sick easily. He stated he also missed work due to “a big hole in the bottom of [his] stump . . . that was real badly infected,” and the company was unable to let him miss so much work “because of the insurance.” (R. 522-23)

Clay described the physical requirements of the job, which included some standing and moving around. A lot of the time he drove around in a golf cart, and he would get off the cart at various locations on the job to check and make sure all the necessary materials were present. He sometimes had to carry boxes of nuts, bolts, or washers, but little else. He stated he was using a prosthesis when he worked for Bushman, but since then, he had been unable to use a prosthesis consistently. According to Clay, when his leg was injured and amputated, it was “pulled out of the socket,” and is not straight. He stated his “pelvic bone is split in half,” making it too painful for him to walk very far with a prosthesis. (R. 523-26) He stated further that the skin at the base of his stump is very thin and the area gets infected easily and takes a long time to heal. (R. 526)

Clay explained that he was fitted for a new prosthesis at the University of Iowa Hospital in Iowa City, but the prosthesis still did not fit properly. According to Clay, he

had obtained a referral to Iowa City from a Veterans Affairs representative in Estherville, Iowa (although Clay is not a Veteran), but he stated the agency would not pay for him to go back to have the prosthesis re-fitted, and he did not have the funds to return for another fitting. (R. 526-28) He stated he had been back two times to try to get the prosthesis fitted properly, without success. His most recent visit to Iowa City was in October 2001. (R. 528-29)

Clay stated that each time he has attempted to wear a prosthesis consistently, he has developed “a big sore down on the bottom of [his] stump . . . a hole or an ulcer they call it on the bottom of [his] leg.” (R. 530) He had tried one prosthesis that he thought might have worked for him, during the time he was working in Boise, Idaho, but he stated his insurance through the company denied payment and he could not afford to have the prosthesis finished. (*Id.*)

Before he worked for Bushman Conveyor, Clay ran heavy equipment for W.H. Hodgman’s, a company that laid blacktop on highways. He stated the job required him to use foot controls, which he no longer was able to do. Driving heavy equipment also gave him trouble with his low back, which he injured on the job while he was running a roller. Clay had another job with Cedar Valley Construction, where he also ran heavy equipment. According to Clay, that job also required the use of foot controls. (R. 531-32)

Clay indicated he also has problems with decreased sensation in his hands and fingers, which makes it difficult for him to do fine manipulation, and also to do tasks like putting the top on a milk bottle. He can manage those types of tasks if he works slowly and is able to watch what he is doing. He attributed the loss of sensation to his motorcycle accident, which resulted in the insertion of steel plates in both of his forearms. He stated he also has occasional problems with coordination, for example when he

reaches for something with his hands. He indicated he sometimes drops or “fumbles” things. (R. 533-34)

With regard to his pain, Clay stated he has “phantom pains 24 hours a day, all the time.” (R. 534) He described the pain as feeling like a hot poker sticking in the bottom of his ankle on the amputated left leg. He stated he experiences the pain as though it is in his leg, even though he knows the leg is not there. (*Id.*) He has found no medication or treatment that relieves the pain, which he rated at four to eight on average, using a scale of one to ten. Clay does not believe he could operate any type of machinery safely because sometimes the pain will make him twitch or jump. (R. 534-35)

Clay stated he also has pain in his back and neck, and he indicated his neck had been broken at some point. He alleviates his back pain by laying down for an hour or two. He stated he is unable to sit for very long without pain. For example, he reads a small-town newspaper each morning, and he has to get up and move around once or twice before he has finished the paper. He also indicated he has difficulty walking using his walker. (R. 535-36) He stated Aleve helps relieve his pain but, according to Clay, aspirin and Aleve were hurting his kidneys and a doctor told him to stop taking them. He stated Tylenol does not give him any relief. (R. 536)

Clay opined he would not be able to work in any job that required him to sit most of the day, for example a surveillance job where he watched a TV monitor. (R. 537) He noted that in 1991, prior to his accident, he worked part-time for five months as a security guard at Fairmont Foods. He watched TV monitors, and every hour he checked all the doors. He also checked the boiler rooms for ammonia leaks. He did not believe he could still do that job because of all the walking required. He stated the constant pain in his back and pelvic bone would prevent him from sitting and watching the monitor all day.

In addition, he noted he would be unable to take the responsibility for responding quickly if something happened. (R. 537-58)

Clay noted he was not under any current medical care at the time of the hearing. He was taking Atenolol for high blood pressure, but no other medications. He stated he can walk one block using his crutches before he has to sit down and rest his arms, noting his wrists and back will begin to hurt if he goes any farther than a block at a time. He stated he can stand in one place, such as when doing the dishes, if he balances himself with one or both hands or has something to lean against. Standing causes his back and pelvic bone to hurt, so he has to sit down and rest in the midst of doing the dishes. (R. 540-51) He stated he usually will wash the glasses and plates, sit down and rest, and then finish the pans and wiping down the cupboards. (R. 542)

Clay stated he is able to squat down and sit in a chair but it hurts his knee “a lot real bad.” (*Id.*) If he has to pick something up off of the floor, he has to sit down on the floor, pick up the object, and then stand back up. He is unable to kneel. If he has to lift or move a heavy object, he sits on the floor and pulls and slides the object across the floor. He stated he is unable to lift and carry objects. (R. 542-43)

Clay also described memory problems. He indicated he has difficulty understanding and recalling what he reads. He also indicated he is forgetful. (R. 543)

Clay stated he has had no income since his alleged disability onset date in March 2001. (R. 544)

Clay stated he was living with his mother, and he helped out with the cooking and dishes when he was able. He did his own laundry, but noted it took him a long time. He stated he has learned to be patient because he knows it will take him longer to complete tasks than it takes other people. (R. 541-42) He described his typical day as follows. He will get up around 6:30 or 7:00 a.m., go to the bathroom, take a shower, read the

paper, and have coffee with his mother. Sometimes they eat breakfast, and if they do, he helps cook breakfast or helps with the dishes. After breakfast, he sometimes goes out and helps his mother in the garden, noting he must sit on the ground to do this. Otherwise, he will “just sit around and read.” (R. 544)

Clay stated he is able to care for his own physical needs. When he has problems, his sister, who is a nurse, will help him. For example, he stated he had problems with his stump healing and he would forget to put medication on it, and his sister would come over and change his bandages and help him. (*Id.*)

According to Clay, his mother fixes lunch, and after lunch he will “just go outside and sit.” (R. 544-45) He indicated he does leatherwork as a hobby, making vests and belts and Bible covers. He opined he could never get any money from the hobby, and he did not think he could do that type of work on a full-time basis. He stated he would like to work again, but he could not think of any type of job he would be able to do. He opined he would have difficulty in a telephone sales job because he is shy and finds it difficult to talk to people, and he would have trouble keeping track of the paperwork involved in the job. (R. 545-46)

Clay stated he can fall asleep without problems, but he wakes up often during the night with pain in his shoulders, arms, and neck. However, he does not take any medication and he is able to fall back asleep again right away. (R. 546)

According to Clay, he gets sick a lot because he has lost his spleen, so he seldom leaves his house. He stated if he is around a lot of people, for instance at a wedding or going out to eat, he usually will be sick a few days later. He stated he had heard about a medication that is supposed to replace the antibodies from the spleen, but he did not have money to go to a doctor and get the medication. (R. 546-47)

In response to the ALJ's questioning, Clay noted he applied for and received unemployment benefits for a time after he was terminated from Bushman Conveyor Company. As part of his application, he indicated he was "ready, willing and able" to work. He stated he applied for several jobs but no one would hire him. (R. 548)

Clay stated he last rode a motorcycle on August 25, 2001. He was arrested for driving while impaired, and served about a month in prison. He stated he used to have problems abusing alcohol and marijuana, but he had not used either since his arrest in August 2001. He indicated he went through a treatment program, and he was not on probation or parole. According to Clay, he never lost a job due to his use of alcohol or other drugs. (R. 550)

Clay stated he had not inquired of Vocational Rehabilitation to see if they would assist him in getting a working prosthesis and retraining for a job he could do. He stated he was unaware Voc-Rehab would assist him in that manner. (R. 550-51) He noted that when he was in prison, he was given a ten-pound lifting limitation, and he was not supposed to stand or sit for more than fifteen minutes at a time. (R. 552)

Clay stated he had not seen a doctor about problems with his hands or back due to lack of funds or insurance to pay for treatment. Therefore, no doctor had diagnosed any problems with his hands or back. (R. 552-53)

2. *Clay's medical history*

The record indicates Clay was injured in a motorcycle accident on October 27, 1996. He suffered a pelvic fracture, an open tibia-fibula fracture on the left with vascular compromise of his left lower extremity, a possible mild closed head injury, a left ulna fracture, left medial orbital wall fracture, and respiratory failure. During his extended hospitalization, his injuries required amputation of his left leg below the knee, a

tracheostomy, splenectomy, revision gastrostomy, fixation of his fractures, and numerous diagnostic procedures, X-rays, and therapeutic interventions including medical therapies, nutritional therapies, and occupational therapy. (See R. 170-450) At the time of his discharge on March 15, 1997, he was “able to walk with very minimal support from a walker with his prosthesis”; however, he was advised not to use the prosthesis for two weeks to allow an ulcer on his distal stump to heal. (See R. 475) He was discharged on independent status with restrictions, and was able to ambulate using his walker. (*Id.*)

While Clay was hospitalized, he was “evaluated for a possible traumatic brain injury and formal neuropsychiatric testing was performed. The findings were inconclusive and could be related to either traumatic brain injury or a history of alcohol abuse.” (R. 474) Two months following his hospital discharge, Clay was unable to remember how many socks to use over his stump when wearing his prosthesis. (*Id.*)

By June 1997, Clay was wearing his prosthesis for a half hour, twice daily, with a plan to increase that time by half an hour a day until he reached three hours a day, and then to extend the wearing time to all day. Doctors’ notes from an Amputee Clinic visit on June 18, 1997, indicate Clay’s phantom pain was decreasing with the use of an Ace bandage on his extremity. (R. 472)

Clay apparently served some time at the Oakdale Medical Classification Center. His “Exit Health Status” report dated October 2, 1997, indicates he wore a prosthesis and used a cane to ambulate; he had pollen allergies; and he had asthma that was asymptomatic at that time. (R. 492)

On February 28, 1998, Clay was evaluated for alcohol/drug dependence by the Division of Vocational Rehabilitation. (R. 451-57) Substance abuse counselor Dee Reisma found Clay to be open to treatment and recovery. Clay indicated he planned to attend college and study engineering. Ms. Reisma assessed Clay’s current GAF at 70.

She expressed no concerns about Clay's physical or emotional condition as a result of alcoholism, and she opined he would have no problems in employment or schooling as a result of his alcohol abuse. Under Clay's strengths, Ms. Reisma noted the following: "[Clay] is determined to better himself. He will not let his disability (loss of leg) deter him from making a living and becoming a responsible citizen. He has a positive attitude and is goal oriented. He gets along well with other. He's dependable and responsible. He's honest and caring." (R. 454) She noted Clay "might need extra help with certain classes for clarification or understanding," but she opined he would "do well in school and is motivated to make changes in his life. He's mature." (*Id.*) It appears Clay completed an intensive outpatient treatment program for alcoholism. (See R. 457)

In May to June 1998, Clay underwent surgical repair of a right flank hernia and revision of a scar on his right flank. He healed well with no infection and no record of problems relating to these procedures. (See R. 458-71, 481)

On March 20, 1999, John F. Tedesco, Ph.D. completed a Psychiatric Review Technique form, apparently at the request of Disability Determination Services. (R. 155-63) Clay failed to respond to letters asking him to call, and Dr. Tedesco concluded there was "insufficient evidence on which to base a mental assessment." (R. 156)

The record contains no evidence of medical treatment between the summer of 1998 and October 2001, when Clay saw Keith L. Probst, M.D. about getting a new prosthesis. Dr. Probst noted Clay had "obtained state papers to obtain a new prosthetic left leg at Iowa City." (R. 485) Clay complained that his old prosthesis was "old and worn out," and no longer fit well. He had an ulcer on his stump and stated he had not been wearing his prosthesis much, although he reported wearing it the week before "when there was another biker funeral." (*Id.*) Clay also stated he had been out of his blood pressure medication for awhile. "He also relate[d] that he took some Morphine from one of his

biker friends for the pain in his leg on the stump last week while he was driving his motorcycle.” (*Id.*) Dr. Probst contacted Iowa City to set up appointments for Clay with both orthopedics and the Department of Internal Medicine. He wrote Clay a new prescription for Atenolol. (*Id.*)

On October 22, 2001, Clay was seen by Reginald R. Cooper, M.D. in the Department of Orthopedic Surgery at the University of Iowa Hospitals and Clinics, with regard to getting a new prosthesis. Clay told Dr. Cooper “he was working at a construction job but the company ha[d] no position for him so he moved back home. He has eaten a lot of his mother’s cooking and gained so much that he is having difficulty fitting in the prosthesis. He does not wear it much now.” (R. 482) The doctor noted Clay had a superficial ulcer on his stump. Clay stated he relieved the ulcer by soaking it and applying an antibiotic ointment. Dr. Cooper ordered a new knee disarticulation prosthesis for Clay. (*Id.*) There is no medical evidence in the record to indicate Clay ever went back to have the prosthesis fitted.

On December 6, 2001, Dr. Probst responded to a DDS request for information regarding Clay’s work-related limitations. (R. 483-84) Dr. Probst noted he had only seen Clay once, and he suggested information from the University of Iowa would be more accurate in assessing Clay’s work-related capacities. Dr. Probst nevertheless opined Clay would have no trouble with handling, seeing, hearing speaking, traveling, or environmental conditions. He stated Clay should do no kneeling, crawling, or excessive climbing, but he opined that once Clay was fitted with a new prosthesis, he should not have problems with standing, walking, or sitting, “other than if this was for a prolonged period of time.” (*Id.*)

On February 13, 2002, Jan Hunter, D.O. completed a Physical Residual Functional Capacity Assessment form in which he opined Clay would be able to lift

twenty pounds occasionally and ten pounds frequently; stand, walk, and/or sit for about six hours in an eight-hour workday; and “[p]ush and/or pull (including operation of hand and/or foot controls)” without limitation. (R. 165) In reaching this assessment, Dr. Hunter noted he had spoken with Clay, who stated the ulcer on his stump was healing, although slowly. He noted Clay “achieved satisfactory/effective use of his prosthesis in the past and has worked as a forklift operator from 1999 through 3/01 using his prosthesis.” (R. 166) Dr. Hunter also noted the record contained insufficient evidence to evaluate Clay’s condition from March 2001 to October 2001. (R. 165)

On April 17, 2002, after he was incarcerated for drunk driving, Clay saw a Department of Corrections doctor to request a wheelchair. Clay complained of right knee pain associated with hopping on his right foot. He sometimes used crutches. (R. 488) A work classification form was issued restricting Clay to lifting no more than ten pounds, no standing or walking for periods longer than fifteen minutes, sleeping in lower bunk only, and no ladder climbing. (R. 491) At the time Clay bonded out of confinement on May 3, 2002, he was noted to have no prosthetic devices and no physical/work limitations. (R. 486)

Clay underwent a disability exam by Ronald J. Creswell, M.D. on June 24, 2002. (R. 495-98) Clay told Dr. Creswell that he enjoyed working and was “not afraid to work,” but he had “just been unable to find any work because of his multiple disabilities.” (R. 495) Clay complained that he had back pain for two or three days per week, and stated he had undergone surgery in 1990, for a herniated disc that resulted from a work-related injury. He also reportedly had a broken neck as a teenager “when a drunk driver hit the vehicle he was riding in.” (*Id.*) He stated his back would be worse when he had to walk on his prosthesis or used his crutches very much. He also

complained of pain down the back of his right buttocks, and the back of his right leg down to the ankle. (*Id.*)

Dr. Creswell noted the ulcer on Clay's stump was "nearing complete healing." (*Id.*) Clay stated he had a new prosthesis coming from Iowa City, because his old one no longer fit correctly. Clay also complained of occasional sharp pains in both wrists, phantom pain in his left leg, decreased hearing in his right ear, and a right hydrocele.

Regarding Clay's last job, Dr. Creswell noted:

[Clay] hasn't worked for about a year. His last job was working at Amazon.com running a forklift. He said they eventually just told him to stay off work until his stump was healed as apparently this ulcer used to be significant in size and there is a spur which causes this ulceration. He said he really can't do much of any physical labor because of his multiple disabilities.

(*Id.*)

Dr. Creswell's physical exam revealed tenderness to palpation from about L-3 to S-1, and negative straight leg raising on the right. He noted Clay's "effort on the range of motion exam was good." (R. 496) The doctor's impressions included the following:

- 1) Multiple disabilities including left BKA with small ulceration.
- 2) Right sciatic type of pain.
- 3) History of lumbar disc disease with continuing pain in the low back.
- 4) Decreased hearing right ear.
- 5) Bilateral wrist pain.

(*Id.*)

Dr. Creswell reached the following conclusion with regard to Clay's functional abilities:

He is really unable to do any kind of lifting or carrying as at this time he ambulates with crutches. Even when he gets his

prosthesis, I think the lifting will be very limited because of the back discomfort. Really unable to stand, walk or move about. He is able to sit during an 8-hour day although I suspect may have some back pain with that. Should have no trouble with handling objects or seeing. Does have a little decreased hearing subjectively in that right ear although it was not checked objectively. No trouble with speaking.

(*Id.*)

There is no further medical evidence in the file. Notably absent are any records of Clay's return visit(s) to Iowa City to fit a new prosthesis.

3. *Vocational expert's testimony*

The ALJ clarified Clay's prior work history with the VE. (R. 557-58) The VE stated none of the skills Clay had acquired in his past relevant work would "transfer to other semi-skilled or skilled but less physical jobs that would need to either be light or sedentary in order to be of significance." (R. 558)

The ALJ then asked the VE the following hypothetical question:

Assume with me you're looking at a person – we have actually two age brackets to consider here but currently he's 50 or above but not yet 55, high school educated, work history as summarized in [the Past Relevant Work Summary, R. 152] by you. I want you to assume a person with medically determinable impairments that result in the same work-related limitations described by Mr. Clay. Crediting that testimony [and] finding it fully factual[,] would you expect a person to be able to do any of the [listed] jobs either as he did them or as they're generally defined?

(R. 559) The VE responded as follows:

No. I don't think he could. He indicated that he has pain that ranges from four to eight on the analog scale. He

indicates that he's sickly which suggests that he would have absenteeism problems. Currently he seldom leaves home I think because of his concern about exposure to anything that might be going around and cause an infection. He indicates that he's slow with manipulation and handling. He indicated that he's able to sit for only brief periods of time. Later in his testimony he indicated that was limited to about 15 minutes while he was in prison. For all practical purposes he can't really stand independently. He really can't walk except with crutches. He indicated that he can't lift and carry anything although apparently he could do some simple lifting while he's stationary, and he also indicated that he has memory problems.

(*Id.*) In addition, the VE stated the hypothetical claimant could not do any other jobs, with those limitations. (R. 559-60)

The ALJ asked the VE a second hypothetical question, based on the findings of Jan Hunter, D.O., in his Physical Residual Functional Capacity Assessment of February 13, 2002. (See R. 164-69) Noting the hypothetical individual's age, education, and work experience were the same as before, the ALJ asked the following question:

This time what if a person could occasionally lift or carry 20 pounds, frequently 10 pounds[;] could stand, walk or sit about six hours of an eight-hour day with normal breaks. Push, pull is unlimited. Postural activities are all occasional which is going to rule out frequent and constant of course. No manipulative limits. No visual or communicative limits or environmental limits. Would this assessment allow for performance of past work if it were found to be credible?

(R. 560)

The VE stated the hypothetical individual would be unable to return to any of Clay's past work, noting it appeared some of Clay's prior employers had made "some significant accommodations" that allowed him to do those jobs. (*Id.*) He specifically

pointed to Clay's jobs as a millwright helper and a tool crib attendant, explaining those jobs are heavy and medium as performed in the national economy. (*Id.*)

However, the VE opined the hypothetical individual would be able to "perform a fairly wide range of unskilled, light jobs," including, for example, small products assembler, inspector and hand packager, and marker or labeler. (R. 560-61) The VE clarified that his opinion was based on a fifty-year-old person, which the ALJ noted would "exclude sedentary jobs by operation of law." (R. 561) If the individual were under age fifty, the VE stated there would be "[n]o significant reduction" in the full range of sedentary work he could perform. (*Id.*)

Again, the VE noted that if Clay's testimony regarding his limitations were taken into account, he would be unable to perform any of the cited jobs. However, the VE noted that the light-duty jobs he had listed "would allow an individual to alternate sitting and standing probably pretty much at will." (*Id.*)

If the hypothetical individual were unable to wear a prosthesis, the VE stated that fact would alter his opinion significantly. He explained that jobs in the light classification assume "a maximum lift of 20 pounds occasionally and or occasionally 10 pounds" [sic]. (R. 562) He also had assumed, in responding to the ALJ's second hypothetical, that the individual could stand, sit, and/or walk for six out of eight hours. An individual who could not wear a prosthesis likely would be unable to meet these requirements. (R. 562-63)

Clay's attorney posed the following hypothetical question to the VE, still assuming the same age, education, and past relevant work as before, but basing the work limitations on the disability examination performed by Ronald J. Creswell, M.D. on June 24, 2002:

So from that there would be no significant lifting, both due to the below-knee amputation and low back pain, unable to

stand, walk or move about. Some ability to sit but because of the back pain associated with that the person wouldn't be able to sit for any great length of time. Handling objects would be limited to only a light grip. The person has asthma and there is a susceptibility to illness due to the splenectomy. Based on that would that preclude all past relevant work?

(R. 563) The VE replied that past relevant work be excluded, and also there probably would be no other types of work the individual could perform. The VE stated, "If I were to identify anything it would have to be something where he could tolerate at least alternate sitting and standing and that doesn't seem to be a viable component of this hypothetical, so I think that would effectively eliminate work." (*Id.*)

Clay's attorney then asked the following question:

For all the jobs that you identified in the Judge's second hypothetical I understand from [Mayo Clinic records regarding Clay's treatment, see R. 474] that there is some type of brain injury. The question I think that was indicated there was whether it was due to the motorcycle accident or alcoholism. But with a demonstrated inability to follow simple instructions – and the example in [those records] was inability to do wound care, would that preclude the types of jobs that you've identified for the Judge based on his hypothetical?

(R. 564-65) The VE responded, "Well, the wound care part of it would not be relative but if he couldn't follow even simple kinds of instructions that would effectively eliminate any kind of employment." (R. 565) Clay's attorney explained that the record in question indicated, in his understanding, that Clay "didn't have the ability to remember how many socks he's supposed to put on for his prosthesis to protect his skin," which counsel viewed as "a very simple instruction." (*Id.*) The VE confirmed that if a person were

incapable of following a very simple instruction, he would be precluded from the types of jobs identified in response to the ALJ's second hypothetical.

The ALJ then asked the VE, "Occasionally if an individual was not able to mentally follow simple instructions . . . would you expect them to be able to do skilled work as a tool crib attendant for over two years?" The VE responded, "No. He surely wouldn't." (*Id.*)

4. *The ALJ's decision*

In finding that Clay was not disabled, the ALJ noted that when Clay was terminated from Bushman Conveyor in March 2001, he sought and received unemployment benefits for a time. At the time he applied for those benefits, he told Job Services "that he was ready, willing and able to work. He did apply for jobs and stated that he believed he could have returned to work even though the hole in his leg was not healed. He ha[d] not contacted Vocational Rehabilitation thereafter." (R. 14)

The ALJ found Clay had not engaged in substantial gainful activity since his alleged onset date. He found Clay to have a severe, medically-determinable impairment of below-the-knee amputation. However, he found the impairment did not meet or equal the Listing requirements. In so finding, the ALJ stated as follows:

Specifically, there is no evidence of amputation of one or both lower extremities at or above the tarsal region, with stump complications resulting in medical inability to use a prosthetic device to ambulate effectively as discussed in [the regulations]. The undersigned recognizes that an inability to effectively use a prosthesis is a cornerstone of the claimant's argument in this matter, but this is not objectively supported. To wit, the record reflects that the claimant has successfully been fitted with and employed a prosthesis in the past, and the most recent record concerning a prosthesis, specifically those

from the University of Iowa in October 2001, do not indicate that the claimant is unable to use a prosthesis. Instead, these records reflect that the claimant was casted for a prosthesis and a new prosthesis was ordered.

(R. 17) The ALJ noted his conclusion was consistent with Dr. Hunter's evaluation. (*Id.*; see R. 164-69)

The ALJ found Clay's hypertension, history of pelvic fracture and left ulna fracture, splenectomy, alcoholism, and neck/back/ankle pain did not rise to the level of severe impairments. (R. 18-19) He noted Clay's hypertension was controlled with medication. He also noted that when Clay initially filed his application for benefits, his only alleged disability was his amputation. In addition, he noted Clay was not under any medical treatment and had not sought medical treatment "related to wrist or pelvic pain, or frequent illnesses due to the removal of his spleen." (R. 18) The ALJ concluded there was nothing in the record to indicate problems with Clay's forearms, hips/pelvis, or susceptibility to illness interfered in any way with his ability to perform his job duties. (*Id.*) He accepted Clay's testimony that his use of alcohol and/or other drugs did not interfere with his work performance, and he found "alcohol and drug issues do not represent an impairment which is severe." (R. 19)

The ALJ evaluated the evidence related to Clay's claim of memory difficulties, and the suggestion of a possible brain injury in the medical records. He noted evaluation and testing had been inconclusive as to whether Clay had suffered a brain injury, and there were no diagnoses of any brain injury or cognitive deficit. (R. 20) He reached the following conclusion regarding Clay's mental abilities:

As such, the objective evidence does not support the presence of an organic mental disorder or similar cognitive deficit which is based upon medically acceptable diagnostic techniques. It is further important to the undersigned that

there are apparently no follow-up evaluations concerning the claimant's mental status or cognitive ability. Highly significant to the undersigned is the fact that, despite his testimony of memory difficulties, the claimant successfully performed a job as a tool crib attendant, despite physical limitations, with this job yielding annual earnings ranging from \$26,000.00 to \$36,000.00. Information provided by the expert vocational witness establishes that this job is a skilled position. The claimant's ability to have performed this type of work until March 2001 greatly detracts from accepting that there are cognitive deficits which preclude or significantly interfere with the claimant's ability to read and understand, or learn job-related tasks. In all, this record fails to support the presence of an organic mental disorder or cognitive deficit which is based upon medically acceptable diagnostic techniques. [Exhibit citations omitted.]

(*Id.*) The ALJ declined to pursue the issue through a consultative medical or psychological examination because he found "no conflicts or ambiguities in this record which require resolution[.]" (*Id.*) He similarly found further referrals with respect to Clay's neck, back, and ankle were not indicated. (*Id.*)

The ALJ rejected Dr. Creswell's evaluation of Clay's functional abilities on the basis that the doctor's assessment was "inconsistent with the claimant's performance of light work until March 2001," and also was "clearly based upon the claimant's description of his functional limitations, given the fact that these restrictions do not appear to be consistent with the objective findings by this physician on physical examination." (R. 22) The ALJ also noted Dr. Creswell's opinion regarding Clay's lifting capacity appeared to be based on Clay's continued use of crutches. (*Id.*) Significantly, the ALJ indicated he would agree Clay could not walk or stand if he limited himself to using crutches. But the ALJ found the evidence shows he was able to work for a significant period of time wearing a prosthesis. (R. 25) According to the ALJ, "the records make

it quite clear that the ulcer [on the bottom of Clay's stump] has been the result of an old, worn out prosthesis which no longer fits properly due to [Clay's] weight gain." (R. 24)

The ALJ found Clay's subjective complaints regarding his limitations not to be credible. He found it significant that although a new prosthesis had been ordered, there is no medical evidence in the record to indicate Clay ever returned for a fitting. He also noted the record contains no evidence that Clay has ever been denied medical treatment due to an inability to pay, weakening Clay's claim that he had not sought needed medical treatment for financial reasons. (R. 24-25)

Considering the evidence as a whole, the ALJ found Clay was unable to return to any of his past relevant work, but he retained the residual functional capacity to perform "at least light work, provided the work does not require more than occasional climbing, balancing, stooping, kneeling, crouching or crawling, and provided the work affords him some flexibility to sit or stand." (R. 25) The ALJ relied on the VE's testimony in concluding Clay could perform a significant number of jobs that exist in the national economy, including, for example, small products assembler, inspector/hand packager, and marker/labeler. (R. 26-27; 28 ¶ 12)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the

claimant is “not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country.” 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step sequential evaluation process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *Dixon v. Barnhart*, 353 F.3d 602, 605 (8th Cir. 2003); *Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner will consider a claimant’s work activity. If the claimant is engaged in substantial gainful activity, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(i).

Second, if the claimant is not engaged in substantial gainful activity, the Commissioner looks to see “whether the claimant has a severe impairment that significantly limits the claimant’s physical or mental ability to perform basic work activities.” *Dixon*, 353 F.3d at 605; accord *Lewis v. Barnhart*, 353 F.3d 642, 645 (8th Cir. 2003). The United States Supreme Court has explained:

The ability to do basic work activities is defined as “the abilities and aptitudes necessary to do most jobs.” . . . Such abilities and aptitudes include “[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling”; “[c]apacities for seeing, hearing, and speaking”; “[u]nderstanding, carrying out and remembering simple instructions”; “[u]se of judgment”; “[r]esponding appropriately to supervision, co-workers, and usual work situations”; and “[d]ealing with changes in a routine work setting.”

Bowen v. Yuckert, 482 U.S. 137, 140-42, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119 (1987) (citing 20 C.F.R. §§ 404.1521(b), 416.921(b)).

Third, if the claimant has a severe impairment, then the Commissioner will consider the medical severity of the impairment. If the impairment meets or equals one of the presumptively disabling impairments listed in the regulations, then the claimant is considered disabled, regardless of age, education, or work experience. 20 C.F.R. § 404.1520; *Kelley*, 133 F.3d at 588.

Fourth, if the claimant's impairment is severe, but it does not meet or equal one of the presumptively disabling impairments, then the Commissioner will assess the claimant's residual functional capacity ("RFC") to determine the claimant's "ability to meet the physical, mental, sensory, and other requirements" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(4)(iv); 404.1545(4); see *Lewis*, 353 F.3d at 645-46 ("RFC is a medical question defined wholly in terms of the claimant's physical ability to perform exertional tasks or, in other words, 'what the claimant can still do' despite his or her physical or mental limitations.") (citing *Bradshaw v. Heckler*, 810 F.2d 786, 790 (8th Cir. 1987); 20 C.F.R. § 404.1520(e) (1986)); *Dixon, supra*. The claimant is responsible for providing evidence the Commissioner will use to make a finding as to the claimant's RFC, but the Commissioner is responsible for developing the claimant's "complete medical history, including arranging for a consultative examination(s) if necessary, and making every reasonable effort to help [the claimant] get medical reports from [the claimant's] own medical sources." 20 C.F.R. § 404.1545(3). The Commissioner also will consider certain non-medical evidence and other evidence listed in the regulations. See *id.* If a claimant retains the RFC to perform past relevant work, then the claimant is not disabled. 20 C.F.R. § 404.1520(4)(iv).

Fifth, if the claimant's RFC as determined in step four will not allow the claimant to perform past relevant work, then the burden shifts to the Commissioner "to prove that there is other work that [the claimant] can do, given [the claimant's] RFC [as determined

at step four], age, education, and work experience.” Clarification of Rules Involving Residual Functional Capacity Assessments, etc., 68 Fed. Reg. 51,153, 51,155 (Aug. 26, 2003). The Commissioner must prove not only that the claimant’s RFC will allow the claimant to make an adjustment to other work, but also that the other work exists in significant numbers in the national economy. *Id.*; 20 C.F.R. § 404.1520(4)(v); *Dixon, supra*; *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) (“[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.”) (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)); *Nevland v. Apfel*, 204 F.3d 853, 857 (8th Cir. 2000). If the claimant can make an adjustment to other work that exists in significant numbers in the national economy, then the Commissioner will find the claimant is not disabled. If the claimant cannot make an adjustment to other work, then the Commissioner will find the claimant is disabled. 20 C.F.R. § 404.1520(r)(v).

B. The Substantial Evidence Standard

The court reviews an ALJ’s decision to determine whether the ALJ applied the correct legal standards, and whether the factual findings are supported by substantial evidence on the record as a whole. *Hensley v. Barnhart*, 352 F.3d 353, 355 (8th Cir. 2003); *Banks v. Massanari*, 258 F.3d 820, 823 (8th Cir. 2001) (citing *Lowe v. Apfel*, 226 F.3d 969, 971 (8th Cir. 2000)); *Berger v. Apfel*, 200 F.3d 1157, 1161 (8th Cir. 2000) (citing 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This review is deferential; the court must affirm the ALJ’s factual findings if they are supported by substantial evidence on the record as a whole. *Id.* (citing *Estes v. Barnhart*, 275 F.3d 722, 724 (8th Cir. 2002); *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th

Cir. 2000)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) (“The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . .”). Under this standard, “[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner’s conclusion.” *Krogmeier, id.*; *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); accord *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence “on the record as a whole” requires consideration of the record in its entirety, taking into account both “evidence that detracts from the Commissioner’s decision as well as evidence that supports it.” *Krogmeier*, 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell*, 242 F.3d at 796; *Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)). The court must “search the record for evidence contradicting the [Commissioner’s] decision and give that evidence appropriate weight when determining whether the overall evidence in support is substantial.” *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (also citing *Cline, supra*).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does not

“reweigh the evidence presented to the ALJ,” *Baldwin*, 349 F.3d at 555 (citing *Bates v. Chater*, 54 F.3d 529, 532 (8th Cir. 1995)), or “review the factual record *de novo*.” *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (citing *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it “possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s findings, [the court] must affirm the [Commissioner’s] decision.” *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); accord *Baldwin*, 349 F.3d at 555; *Young v. Apfel*, 221 F.3d 1065, 1068 (8th Cir. 2000). This is true even in cases where the court “might have weighed the evidence differently.” *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); accord *Krogmeier*, 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse the Commissioner’s decision “merely because substantial evidence would have supported an opposite decision.” *Baldwin*, 349 F.3d at 555 (citing *Grebenick v. Chater*, 121 F.3d 1193, 1198 (8th Cir. 1997)); *Young*, 221 F.3d at 1068; see *Pearsall*, 274 F.3d at 1217; *Gowell*, 242 F.3d at 796; *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997).

On the issue of an ALJ’s determination that a claimant’s subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ’s credibility determinations are entitled to considerable weight. See, e.g., *Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.*, 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant’s subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may

only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler*:

The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:

- 1) the claimant's daily activities;
- 2) the duration, frequency and intensity of the pain;
- 3) precipitating and aggravating factors;
- 4) dosage, effectiveness and side effects of medication;
- 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

In his briefs, Clay argues at length that the ALJ erred in rejecting Dr. Creswell's opinion, and in finding Clay's subjective complaints of pain not to be credible. He notes that when presented with a hypothetical question that included Dr. Creswell's findings, the VE testified the hypothetical individual would be unable to sustain gainful employment.

Though Clay's arguments are well stated, the court is not persuaded. The ALJ discussed his findings in detail, amply supporting his conclusions with citations to the record evidence. Of particular significance to the court is the lack of medical evidence

indicating Clay returned to Iowa City to have his new prosthesis fitted. Clay testified he had returned twice in an attempt to get a properly-fitting prosthesis, but there are no records from Iowa City to substantiate his testimony.

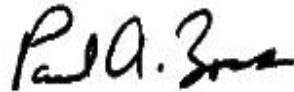
Viewing the record as a whole, the court finds substantial evidence exists to support the ALJ's decision.

V. CONCLUSION

For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections¹ to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the Commissioner's decision be affirmed, and judgment be entered for the Commissioner and against Clay.²

IT IS SO ORDERED.

DATED this 3rd day of February, 2005.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

¹Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

²NOTE: If the district court overrules this recommendation and final judgment is entered for the plaintiff, the plaintiff's counsel must comply with the requirements of Local Rule 54.2(b) in connection with any application for attorney fees.